

DEC 4 1978

MICHAEL KODAK, JR., CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,

vs. *Petitioners,*

LEROY FOUST,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

LAURENCE J. COHEN
Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

WILLIAM J. HICKEY
Mullholland, Hickey, Lyman,
McCormick, Fisher & Hickey
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 Sixteenth Street, N.W.
Washington, D.C. 20005

*Of Counsel**Attorneys for Petitioners*

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
INTRODUCTION AND SUMMARY OF ARGUMENT	8
ARGUMENT	11
I. Punitive Damages Are Not a Proper Remedy for Breach of the Duty of Fair Representation Under the Railway Labor Act	11
A. The National Labor Policy	11
B. The Language of the RLA	24
C. The Opinion Below	28
D. A Generally Applicable Principle of Construction	34
II. Punitive Damages Could Not Properly be Awarded on This Record	45
CONCLUSION	51
APPENDIX A—Statute Involved	1a
APPENDIX B—Excerpts from Deposition of D. F. Jones	8a
APPENDIX C—Letters from D. F. Jones to Leroy Foust	11a

II

TABLE OF AUTHORITIES

CASES:	Page
Automobile Workers v. Russell, 356 U.S. 644	23, 32
Basista v. Weir, 340 F.2d 74 (C.A. 3)	31
Baumel v. Rosen, 421 F.2d 571, (C.A. 4), cert. denied, 396 U.S. 1037	45
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723	41
Brady v. Trans World Airlines, Inc., 196 F. Supp. 504, (D. Del.), affirmed without reaching this issue, 401 F.2d 87, (C.A. 3) cert. denied, 393 U.S. 1048	29, 32, 33
Bruce's Juices v. American Can Co., 330 U.S. 743..	41
Butler v. Local Union 823, Int. Bro. of Teamsters, etc., 514 F.2d 442, (C.A. 8)	30, 49
Carey v. Piphus, 435 U.S. 247	10, 31, 47, 50, 51
Carpenters Local v. Labor Board, 365 U.S. 651....	15
Chicago & N.W.R. Co. v. United Transp. Union, 402 U.S. 570	11, 25
Commissioner v. Glenshaw Glass Co., 348 U.S. 426	35
Conley v. Gibson, 355 U.S. 41	27
Consolidated Edison Co. v. Labor Board, 305 U.S. 197	15
Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290 (D.Wyo.)	29
Curtis Publishing Co. v. Butts, 388 U.S. 130	44
Day v. Woodworth, 13 How. (54 U.S.) 363	44
Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (C.A. 3), cert. denied, 434 U.S. 837.....	12, 13, 24, 25, 28
De Haas v. Empire Petroleum Co., 435 F.2d 1223 (C.A. 10)	45
Elgin, Joliet & Eastern R. Co. v. Burley, 325 U.S. 711, reaffirmed on rehearing, 327 U.S. 661..5, 27, 50, 51	
Erie R.R. Co. v. Tompkins, 304 U.S. 64	44
Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (C.A. 8)	30
Farmer v. Carpenters, 430 U.S. 290	23, 24
Ford Motor Co. v. Huffman, 345 U.S. 330	11
Gertz v. Robert Welch, Inc., 418 U.S. 323	32, 39, 42

III

TABLE OF AUTHORITIES—Continued

	Page
Graham v. Brotherhood of F.L. & E., 338 U.S. 232..	27
Green v. Wolf Corp., 406 F.2d 291 (C.A. 2), cert. denied, 395 U.S. 977	45
Harrison v. United Transp. Union, 530 F.2d 558 (C.A. 4), cert. denied, 425 U.S. 958	30, 33, 41, 49
Humphrey v. Moore, 375 U.S. 335	19
J. I. Case Co. v. Labor Board, 321 U.S. 332	11
Jones v. Mayer Co., 392 U.S. 409	10, 46, 47
Lassiter v. Operating Engineers, 349 So.2d 622 (Fla. Sup. Ct.)	43
Letter Carriers v. Austin, 418 U.S. 264	24
Linn v. Plant Guard Workers, 383 U.S. 53	23, 31
Local 57, International Ladies' Garment Wkrs.' U. v. NLRB, 374 F.2d 295 (C.A.D.C.), cert. denied, 387 U.S. 942	15
Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (C.A. 3)	21
Lyons v. Westinghouse Electric Cooperation, 222 F.2d 184 (C.A. 2)	35
Machinists v. Central Airlines, 372 U.S. 682	11
Milwaukee, etc., Ry. Co. v. Arms, 91 U.S. 489	47
Mourning v. Family Publications Service, 411 U.S. 356	37
NAACP v. Overstreet, 384 U.S. 118	44
Nader v. Allegheny Airlines, Inc., 512 F.2d 527 (C.A.D.C.), reversed on other grounds, 426 U.S. 290	10, 48
National Labor Relations Board v. Coats & Clark, Inc., 241 F.2d 556 (C.A. 5)	16
New York Times Co. v. Sullivan, 376 U.S. 254	31, 45
Overnight Motor Transportation Co. v. Missel, 316 U.S. 572	35
Philadelphia, etc. Ry. Co. v. Quigley, 21 How. (62 U.S.) 202	46
Railroad Telegraphers v. Railway Express Agency, 321 U.S. 342	11
Republic Steel Corp. v. Labor Board, 311 U.S. 7....	10, 14, 17, 20, 23
Rosenbloom v. Metromedia, 403 U.S. 29.....	31, 32, 42

IV

TABLE OF AUTHORITIES—Continued

	Page
Steele v. Louisville & Nashville R. Co., 323 U.S. 192	8, 9, 26, 44, 45
Swift v. Tyson, 16 Pet. (41 U.S.) 1	44
Teamsters Union v. Morton, 377 U.S. 252	10, 16, 17
Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks, 281 U.S. 548	25, 45
United Workers v. Laburnum Corp., 347 U.S. 656 ..	22, 43
United Mine Workers v. Patton, 211 F.2d 742 (C.A. 4)	10, 17, 33, 34, 35
Vaca v. Sipes, 386 U.S. 171	10, 12, 17, 18, 19, 20, 22, 31
Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515	25
Williams v. Pacific Maritime Assoc., 421 F.2d 1287 (C.A. 9)	10, 18, 29
STATUTES:	
Bank Holding Company Amendments Act of 1970, Public Law 91-607, 84 Stat. 1760 <i>et seq.</i>	
§ 106(e), 12 U.S.C. § 1975(e)	36
Civil Rights Act of 1866, 42 U.S.C. § 1982	46
Civil Rights Act of 1871, 42 U.S.C. § 1983	31, 47
Civil Rights Act of 1968, Public Law 90-284, 82 Stat. 73, <i>et seq.</i> , 42 U.S.C. § 3601, <i>et seq.</i> Title VIII	35
Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, Pub. Law 94-559, 42 U.S.C. § 1988	40
Copyright Law (1976), Public Law 94-553, 90 Stat. 2541 <i>et seq.</i> 17 U.S.C. § 1 <i>et seq.</i>	
§ 504(c)	37, 38
Criminal Code: 18 U.S.C. § 2520	36
Equal Credit Opportunity Act, Title V of Public Law 93-495, 88 Stat. 1521, <i>et seq.</i> (1974), 15 U.S.C. §§ 1691(e)	36
Fair Labor Standards Act (1938), 29 U.S.C. 201, <i>et seq.</i>	
§ 16(b)	35
Federal Employer's Liability Act (1939), 53 Stat. 1404, 45 U.S.C. § 51, <i>et seq.</i>	6

V

TABLE OF AUTHORITIES—Continued

	Page
Judicial Code: 28 U.S.C. § 1254(2)	2
Labor-Management Relations Act (1947), 29 U.S.C. § 141, <i>et seq.</i>	
§ 301	11, 21, 22
§ 303	10, 16, 17, 34
National Labor Relations Act (1935), 49 Stat. 449, 29 U.S.C. § 151, <i>et seq.</i>	<i>passim</i>
Omnibus Crime Control and Safe Streets Acts of 1968, Public Law 90-351, 82 Stat. 197, <i>et seq.</i>	
Title III	35, 36
Public Law 93-495, 88 Stat. 1521 <i>et seq.</i>	36
§ 503	37
Railroad Retirement Act (1937), 50 Stat. 307, 45 U.S.C. § 228a, <i>et seq.</i>	6
Railroad Unemployment Insurance Act (1938), 45 U.S.C. § 351, <i>et seq.</i>	6
Railway Labor Act, 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), etc., 45 U.S.C. §§ 151-188	<i>passim</i>
§ 2	2
§ 2, First	26, 27
§ 2, Second	26
§ 2, Tenth	10, 25, 26, 28, 45
§ 2, Eleventh	29
§ 204	11
Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 77b, <i>et seq.</i>	
§ 10(b)	45
Truth in Lending Act (1968), Public Law 90-321, 82 Stat. 146, 15 U.S.C. § 1601, <i>et seq.</i>	36, 37
15 U.S.C. § 1640	37
MISCELLANEOUS:	
Briefs and Records, #45 Oct. Term, 1944	9
Prosser, Handbook of the Law of Torts (4th Edition, 1971)	10, 39, 40, 48

IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-38

INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS, ET AL.,

Petitioners,

VS.

LEROY FOUST,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 572 F.2d 710, appears in the Appendix to the Petition for a Writ of Certiorari ("Pet.") at pp. 1a-19a. The District Court wrote a brief unreported opinion denying a motion to dismiss or for summary judgment, which is reproduced at A. 12.¹

¹ "A." refers to the Appendix in this Court.

JURISDICTION

The decision of the Court of Appeals was entered on March 6, 1978; a timely petition for rehearing was denied May 24, 1978. The petition for a writ of certiorari was granted on October 10, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This is an action for breach of the duty of fair representation under the Railway Labor Act. The proceedings below and the partial denial of certiorari have established for the purpose of this case that the union breached its duty, although there was no evidence of malice or discriminatory intent or bad faith, and that compensatory damages of \$40,000 were properly assessed against the union for this breach. The question presented is whether the trial court erred in instructing the jury that it may award punitive damages and in refusing to set aside the verdict insofar as it awarded such damages.

STATUTE INVOLVED

This case involves the Railway Labor Act, 44 Stat. 577 (1926), as amended by 48 Stat. 1185 (1934), etc., 45 U.S.C. §§ 151-188 (sometimes hereafter "the RLA"). Particularly pertinent are certain provisions of § 2 of the RLA, which are reproduced in an Appendix hereto, pp. 1a-7a, *infra*.

STATEMENT OF THE CASE

1. As the Court of Appeals noted, this case grows out of

a jury verdict holding the [International Brotherhood of Electrical Workers] liable for breach of duty to fairly represent plaintiff-appellee Leroy Foust in grievance proceedings addressed to the Union Pacific Railroad and ultimately to the Railway Adjustment Board. The judgment of the district court was in favor of Foust and included an award of \$40,000

actual damages and \$75,000 punitive damages. [Pet. 1a.]

Following the well settled rule that the evidence in an appeal from a jury verdict is to be viewed most favorably to the prevailing party, that court then summarized the facts as follows:

Foust was a radioman, who had been employed by Union Pacific Railroad and had been a member of the International Brotherhood of Electrical Workers, which organization was his collective bargaining representative while he was employed by the railroad. The individual defendants herein are the officers of the Union. The injury to Foust occurred on March 9, 1970, while he was on the job. He had a claim against the railroad under the Federal Employer's Liability Act, which claim was settled on September 25, 1973. The settlement provided for payment of \$75,000 to Foust less \$2,600 in sickness benefits.² He waived future right of employment and any claim that he might have had for alleged wrongful discharge against the railroad.

His second claim [against the Union Pacific] was that which had arisen as a result of the railroad company terminating his employment. A release was given with respect to this when he received the \$75,000 settlement.

The claim in the instant case is against the Union and is based on its alleged failure to represent him fairly in the proceedings having to do with his grievance which grew out of the termination of his employment by the Union Pacific Railroad Company.

* * *

After his injury on March 9, 1970, Foust went on leave of absence from his job in order to obtain medical treatment for his injured back.

² Beginning on May 2, 1971 and continuing at least to the date of trial (May 1976), Foust received a monthly disability annuity. As of 1976 the amount was \$351.95 a month. In applying for the annuity, Foust "stated that [he was] physically disabled from performing the work of his job." (A. 55-56.)

The rules in the Collective Bargaining Agreement provided for an employee to file a request for a leave of absence for a limited period of time with rights of renewal on request. Based upon Rule 23(b) of the Collective Bargaining Agreement, he must apply for leave of absence at the peril of being terminated. The Agreement provides:

Failure to report for duty at the expiration of leave of absence shall terminate an employee's service and seniority, unless he presents a reasonable excuse for such failure not later than seven days after expiration of leave of absence.

On January 12, 1971, Union Pacific advised Foust by letter that his current leave of absence had expired December 22, 1970; that they had not heard from him; and that it was necessary that a proper request for an extension accompanied by a statement from his doctor be furnished. On January 21, 1971, Foust's then attorney informed the railroad that Foust had filed a request for extension in December and asked whether it had been received and, if not, what forms were needed.

The railroad responded on January 25, 1971, advising the attorney that it still did not have a physician's statement and that when one was received Foust's request for leave would be considered. However, on February 3, the railroad wrote to Foust and advised him that he was being terminated for failure to request an extension prior to expiration of his leave and for failure to furnish a statement from his doctor as to the necessity for additional leave.

Foust's attorney [Edward P. Moriarity] contacted the railroad in an attempt to get the decision to discharge Foust reversed. On March 26, 51 days after the date of discharge, [Moriarity] wrote to one Dean Jones, District Chairman of the Brotherhood. This letter was received Saturday, March 27. Thereupon, Jones contacted the General Chairman of the Systems Council in Omaha, Leo Wisniski. Wisniski prepared a letter which was sent first to Jones in

Omaha, and then sent to Foust with Jones' signature. This was dated April 5. It acknowledged receipt of the letter from Foust's lawyer. It explained that Rule 21 of the Collective Bargaining Agreement required a grievance to be presented in writing by or on behalf of the employee involved. The necessity to receive a written authority to handle claims or grievances on behalf of an employee was explained. The letter went on to say that: "... Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures ..."

Jones filed a claim on Foust's behalf, but did not do so before April 6, which was two days after the deadline. The claim letter was prepared by Wisniski in Omaha and was mailed to Jones in Rawlins, Wyoming, and then sent by Jones to the railroad officer in Omaha. * * * [T]his claim was denied because of its not having been timely filed.³ The Union appealed this decision, but it was finally denied by the Railway Board of Adjustments as having been filed two days late. [Pet. 2a-6a, footnote omitted.]

2. There are certain additional undisputed facts that place the foregoing summary in context.

First, in 1971, Jones was both a Union Pacific equipment man, working full time at that job which required substantial travel, and the IBEW District Chairman for the Union Pacific's Eastern District. (A. 39.) Jones "operate[d] out of [his] house for no compensation". (Jones Deposition, p. 56).⁴ This Union position, which he

³ The elided portion of the opinion below reads, "It is not surprising that * * *". That phrase is omitted because we accept the lower court's summary of the facts, but not its characterization of their import.

⁴ The portions of the Jones Deposition and the letters from Jones to Foust cited in this and the next paragraph were not included in the Appendix. For the Court's convenience, they are reproduced respectively as Appendix B and Appendix C to this Brief.

had held since 1968, entailed the "filing and handling of claims and grievances of men in [his] craft." (Jones Deposition, p. 9.) At the time in question, Wisniski was the IBEW General Chairman for the Union Pacific. He had held that paid full time position since 1962. Prior to that, he had been a railroad electrician. (A. 85.) Wisniski "handle[d] all and settle[d] all claims and grievances after they have been handled on the local level." (A. 85.)

Second, Foust's case was out of the ordinary in two respects. It was presented to Jones by a third person rather than the grievant and grew out of a job related injury. (Jones Deposition, p. 69.) It was Wisniski's and Jones' understanding: that "Rule 21 [of the collective agreement] provides that all claims or grievances must be presented in writing *by* or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling," (letter from Jones to Foust dated April 5, 1971);⁵ and that injury related claims do not arise and are not handled under the contract but rather under the applicable federal laws: "there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employees are withheld from service by Doctors orders" (Letter from Jones to Foust dated April 9, 1971).⁶

Third, Foust testified:

⁵ The requirement that a union processing a railroad employee's grievance must secure the employee's authorization to do so is spelled out in *Elgin J.&E. R. Co. v. Burley*, 325 U.S. 711, adhered to on rehearing, 327 U.S. 661, which is discussed at pp. 50-51, *infra*.

⁶ See the Federal Employer's Liability Act, 45 U.S.C. §§ 51, *et seq.*; the Railroad Retirement Act, 45 U.S.C. §§ 228a *et seq.* and the Railroad Unemployment Insurance Act, 45 U.S.C. §§ 351, *et seq.*, which respectively provide railroad employees injured on the job a federal cause of action in tort, a disability annuity and sickness benefits.

Q. [By Mr. Hickey] During the period February 5, 1971, Mr. Foust, to April 5, 6, 7, 1971, did you ever personally communicate with Mr. Jones? Personally communicate, did you, during that period?

A. What was your first date?

Q. February 5, 1971, the date you received your discharge letter.

A. No.

Q. You did not?

A. No.

Q. Did you ever communicate with Mr. Wisniski?

A. No.

Q. Did you ever communicate with any representative of the Union?

A. No. I had my attorneys do this.

Q. You had your attorneys do that?

A. Yes. [A. 42.]

And, as the Court of Appeals' noted between February 5, 1971 and April 5, 1971 the sole communication to the Union by Foust's attorneys was the certified letter to Jones dated Friday, March 26, 1971 signed for by Jones' daughter on Saturday, March 27 (eight days before the end of the 60-day period for filing Foust's grievance).

Fourth, Foust also testified:

Q. [By Mr. Hickey] Do you know of any reason why they [Wisniski or Jones] would want to do you harm for any reason whatsoever?

A. No, I can't truthfully say that there was.

* * *

Q. [By Mr. Hickey] Do you know what the Union did that you had a basis to complain about or did not do?

A. That the Union?

Q. Yes.

A. They didn't represent me properly.

Q. Can you explain that for us in how you feel they did not represent you properly?

A. Well, in this one ruling here they ruled two days after the sixtieth day limit so the Union was two days late.

Q. All right, sir. Now so they filed your claim two days late. Anything else?

A. Well, due to that I was terminated so that just about covers everything. [A. 44.]

3. Over the Union's objection (A. 68-69) the case was sent to the jury with an instruction permitting the award of punitive damages. (A. 65-67.) The jury did make such an award in the amount of \$75,000 (A. 69, 90), the sum the plaintiff requested (A. 9-10, 59); the District Court denied the Union's motion for a judgment notwithstanding the verdict or for a new trial (A. 94); on appeal the Tenth Circuit "approve[d] * * * the submission by the court of the issue of exemplary damages to the jury and [found] no fault in the trial court's instruction" (Pet. 18a).⁷ This case is before this Court pursuant to a grant of certiorari limited to the punitive damage question.

INTRODUCTION AND SUMMARY OF ARGUMENT

When, in *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, this Court declared the existence of the bargaining agent's duty of fair representation under the Railway Labor Act, it stated that "the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of that duty." (*Id.*

⁷ While recognizing that "[a]bout the only tangible evidence in the record is for lost wages, which would be based on [Foust] continuing to have his old job", the Court of Appeals also affirmed the compensatory damages award, stating that the trial "court first told the jury that it was 'to ignore any evidence relating to whether or not the plaintiff was wrongfully discharged from employment by the Union Pacific Railroad Company' * * *" and that the "union itself consented to the court's instruction that the wrongful discharge suit and the fair representation action were distinct and separate * * *." (Pet. 14a-16a.)

at 207.) ("The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." (*Id.* at 203-204).)

The availability of punitive damages was not discussed, no such relief having been sought in the complaint which this Court reinstated. (See Record, #45 Oct. Term 1944, p. 10.) But the *Steele* Court did state how questions of remedy for breach of the duty of fair representation are to be decided:

[T]he right asserted, which is derived from the duty imposed by the statute on the bargaining representative, is a federal right implied from the statute and the policy which it has adopted. It is the federal statute which condemns as unlawful the Brotherhood's conduct. "The extent and nature of the legal consequences of this condemnation, though left by the statute to judicial determination, are nevertheless to be derived from it and the federal policy which it has adopted. *Deitrick v. Greaney*, 309 U.S. 190, 200, 201; *Board of County Commissioners v. United States*, 308 U.S. 343; *Sola Electric Co. v. Jefferson Co.*, 317 U.S. 173, 176-7; cf. *Clearfield Trust Co. v. United States*, 318 U.S. 363. [323 U.S. at 204. Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457.]

We begin this task of extrapolation by surveying the cases arising under the National Labor Relations Act of 1935 (NLRA) and the Labor-Management Relations Act of 1947 (LMRA), which spell out the national labor policy on remedies. We do so because those precedents are far more complete and informative with regard to the question posed here than the language and structure of the RLA. The principle that emerges is that these Acts are "essentially remedial" and do not "confer a punitive

jurisdiction." (*Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10, 11. See also *Teamsters Union v. Morton*, 377 U.S. 252, 260-261 (§ 303 of the LMRA).) It also appears, as the Ninth Circuit has held (*Williams v. Pacific Maritime Association*, 421 F.2d 1287, 1289), that in *Vaca v. Sipes*, 386 U.S. 171, 195, an LMRA fair representation case, this Court has recognized that punitive damages are not available for a union's failure to properly process a grievance.

We then turn from the NLRA and LMRA materials to the RLA and show that the lesson we draw from the overall labor law is supported by, or at the least wholly consistent with, that statute's provision on remedies, § 2 Tenth.

We conclude Part I of our argument by a demonstration that the Court of Appeals' asserted justification for permitting punitive damages cannot survive scrutiny; and by a proposal derived from Judge Parker's opinion in *United Mine Workers v. Patton*, 211 F.2d 742 (C.A. 4) that, as a general matter, since Congress has repeatedly made express provision for damages in excess of those actually sustained by the plaintiff, the intent to allow such damages under a federal statute should be attributed to Congress only if such intent affirmatively appears in the statute's language or from its legislative history. We point out that the policy judgment as to whether punitive damages should be allowed is one peculiarly suited to legislative determination.

In Part II of the brief we show that "mere inadvertence or even gross negligence will not suffice to support an award of punitive damages." (*Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (C.A.D.C.), citing Prosser, Torts, pp. 9-10 (4th ed. 1971). See also *Jones v. Mayer Co.*, 392 U.S. 409, 414-415, n.9; *Carey v. Phipps*, 435 U.S. 247, 257, n.11.) Viewing the evidence most favorably to the plaintiff, it cannot possibly support a punitive damage award under that standard.

ARGUMENT

I. PUNITIVE DAMAGES ARE NOT A PROPER REMEDY FOR BREACH OF THE DUTY OF FAIR REPRESENTATION UNDER THE RAILWAY LABOR ACT.

A. *The National Labor Policy.* (1). In embarking on the inquiry that follows we recognize that " * * * all parallels between the NLRA and the Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes." (*Chicago & N.W.R. Co. v. United Transp. Union*, 402 U.S. 570, 579, n.11.) But as that case illustrates (*id.* at 578-579), this Court has, where there are no pertinent "differences between the statutory schemes" (*id.*), repeatedly drawn such parallels between these two labor statutes.* And, whatever similarities and differences may be found in other contexts, the duty of fair representation under the NLRA is parallel to the duty originally declared under the RLA, as the Court made clear in its first NLRA fair representation case, *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337:

The National Labor Relations Act, as passed in 1935 and as amended in 1947, exemplifies the faith of Congress in free collective bargaining between employers and their employees when conducted by freely and fairly chosen representatives of appropriate units of employees. That the authority of bargaining representatives, however, is not absolute

* See also, e.g., *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 347: "The decision in *J. I. Case Co. v. National Labor Relations Board* decided today, 321 U.S. 332, considers more generally the relation of individual contracts to collective bargaining, and much that is said in that opinion is applicable here"; *Machinists v. Central Airlines*, 372 U.S. 682, 691: "[T]he [RLA] § 204 contract, like the Labor Management Relations Act § 301 contract is a federal contract and is therefore governed and enforceable by federal law, in the federal courts."

is recognized in *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-199, in connection with comparable provisions of the Railway Labor Act. Their statutory obligation to represent all members of an appropriate unit requires them to make an honest effort to serve the interests of all of those members, without hostility to any. *Id.* at 198, 202-204; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 211; *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768.

The point that the NLRA law in this respect rests on the rule declared in *Steele* has since been reemphasized, most notably in *Vaca v. Sipes*, 386 U.S. 171, 177:

It is now well established that, as the exclusive bargaining representative of the employees in Owens' bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with Swift, see *Ford Motor Co. v. Huffman*, 345 U.S. 330; *Syres v. Oil Workers International Union*, 350 U.S. 892, and in its enforcement of the resulting collective bargaining agreement, see *Humphrey v. Moore*, 375 U.S. 335. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, see *Steele v. Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, and was soon extended to unions certified under the N. L. R. A., see *Ford Motor Co. v. Huffman*, *supra*. [See also, *Vaca*, 386 U.S. at 182; *Hines v. Anchor Motor Freight*, 424 U.S. 554, 564.]

(2). In *Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, cert. denied, 434 U.S. 837, the Third Circuit,

faced with the questions presented here, ruled that the RLA does not provide punitive damages for breaches of the duty of fair representation, relying in large part on the "numerous labor law decisions limiting relief only to redress of specific injuries and refusing to impose punitive sanctions" (*id.* at 1019). That court noted:

Punitive damages have been consistently rejected in unfair labor practice cases under the National Labor Relations Act, see *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-12 (1940); *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 655 (1961); *NLRB v. United States Steel Corp.*, 278 F.2d 896, 900-901 (3d Cir. 1960), cert. denied, 366 U.S. 908 (1961); in actions for recovery of tortious damages under § 303 of the Labor-Management Relations Act, 29 U.S.C. § 187, *Teamsters Local 20 v. Morton*, 377 U.S. 252, 260-261 (1964); and in actions arising under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, *United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962) (per curiam en banc), in which Chief Judge Biggs, concurring, found that "it is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments." [552 F.2d at 1019.]

Because we submit that this policy is controlling on the present issue, we shall discuss in some detail the precedents cited in *Deboles* and others in accord.

The classic statement of the remedial, as opposed to punitive, character of the NLRA's policy is that of Chief

Justice Hughes in *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10-12:

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (§ 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives.

* * *

Th[e] language [of § 10(c)] should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order." We have said that the power to command affirmative action is remedial.

not punitive. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 235, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267, 268. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.⁹

The last of these observations is particularly pertinent because the proponents of punitive damages attach major, if not principal, importance to their assumed deterrent effect. See Point I D, *infra*. That this rationale is unacceptable under the NLRA was made clear by the present Chief Justice, writing on behalf of the District of Columbia Circuit in *Local 57, International Ladies' Garment Wkrs.' U. v. NLRB*, 374 F.2d 295, cert. denied, 387 U.S. 942:

As final argument, the Board urges that the remedy is necessary to deter other employers from fleeing union relationships and thus to protect statutory rights of employees generally, although this rationale was not suggested prior to filing the Board brief here. It has been established, however, that the purpose of Board remedies is to rectify the harm done the injured workers, not to provide punitive meas-

⁹ So, too, in *Carpenters Local v. Labor Board*, 365 U.S. 651, 655, this Court disapproved a Board order which had required the union to return dues and fees paid by employees as a remedy for an unlawful closed shop agreement between the union and the employer. Because there was no basis for concluding that "the unlawful contract had caused or compelled the payment of the dues which the Labor Board had ordered refunded"; the reimbursement remedy went beyond removing the "consequence of the violation" (quoting *Consolidated Edison Co. v. Labor Board*, 305 U.S. 197, 236) and was therefore impermissibly punitive rather than remedial.

ures against errant employers. "[T]he power to command affirmative action is remedial, not punitive." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940). *Deterrence alone is not a proper basis for a remedy. Ibid.*; *NLRB v. Coats & Clark, Inc.*, 241 F.2d 556, 561 (5th Cir. 1957). The Board argues that the order is permitted by Section 10(a), which allows the Board "to prevent any person from engaging in any unfair labor practice." But it seems quite clear that this means the Board may stop an actively continuing unfair labor practice that has been discovered and adjudicated, as distinguished from a general deterrence of unfair labor practices. [374 F.2d at 303-304, footnote omitted, emphasis added.]¹⁰

This Court has also held that Congress disapproved punitive damage awards in suits under § 303 of the LMRA, which provides that a person "injured in his business or property" by illegal secondary boycotting "shall recover the damages by him sustained." In *Teamsters Union v. Morton*, 377 U.S. 252, the Court unanimously ruled, reversing a punitive damage award:

Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legis-

¹⁰ In *National Labor Relations Board v. Coats & Clark, Inc.*, 241 F.2d 556, 561 (C.A. 5), which was cited in *Local 57, supra*, Judge Tuttle wrote:

The Board thus adverts to two different, though not mutually exclusive aspects of a remedial order: the order may be designed to make someone whole who has been deprived of a recognized interest by acts that constitute a violation of the Act and/or the order may be designed to prevent the violator from benefitting by his misdeed. If neither of those aspects is present it is hard to see how an order may be considered "remedial" as distinct from merely punitive; every punishment made to "fit the crime" is not necessarily remedial, especially if its purpose is more to provide "a source of innocent merriment," i.e. serve as an example, rather than to restore to someone a right he is entitled to or to deprive a malfactor of an advantage unjustly seized.

lative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated only state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law." *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages. [377 U.S. at 260-261, footnote omitted.]

Thus, *Morton* held both that punitive damages are unavailable for a violation of § 303, and that this provision embodies a federal policy which precludes such an award for violation of state law forbidding the same conduct.¹¹ The Court cited with approval (*id.* at 261, n.17) *United Mine Workers v. Patton*, 211 F.2d 742, 748-750 (C.A.4), which anticipated the *Morton* result; the *Patton* case is discussed at pp. 33-35, *infra*.

(3). *Republic Steel* and *Morton* state in the clearest terms a national labor policy of remedial and not punitive sanctions. Admittedly, both cases arose in a context at one remove from that here. There is, however, a decision of this Court—*Vaca, supra*—that in terms treats with the question of whether punitive damages are recoverable in

¹¹ Of course, any award for strike conduct not unlawful under § 303 was proscribed by the holding earlier in the *Morton* opinion that the States may not interfere with conduct which Congress left to the free play of economic forces. (See 377 U.S. at 259-260.)

duty of fair representation suits. Because we are uncertain as to the scope of its holding on this question we have postponed consideration of that precedent to this point. In Part IV of the *Vaca* opinion, the Court discussed what damages a plaintiff may recover against a union for breach of the duty of fair representation:

For the Union's role in "preventing Plaintiff from completely exhausting administrative remedies," Owens requested, and the jury awarded, compensatory damages for the above-described breach of contract plus punitive damages of \$3,000. R. at 4. We hold that such damages are not recoverable from the Union in the circumstances of this case. [386 U.S. at 195.]

The succeeding discussion dealt with the proper measure of compensatory damages, stating the principle that liability is to be apportioned "between the employer and the union according to the damage caused by the fault of each." (*Id.* at 197.) Pursuant to that principle "even if the union had breached its duty, all or almost all of Owens' damages would still [have been] attributable to his allegedly wrongful discharge by Swift." (*Id.* at 198).

The holding that punitive damages were not recoverable from the union, while not otherwise elaborated, may be explained on either of two possible grounds: (1) that punitive damages are not recoverable against a union that breaches its duty of fair representation in handling a grievance, or (2) that in such a case punitive damages may not be recovered from a party which is responsible for no or almost no compensatory damages.

In *Williams v. Pacific Maritime Association*, 421 F.2d 1287, 1289 (C.A. 9), the Court of Appeals read *Vaca*'s holding as resting on the first of these grounds:

Turning to the merits, we think the proposition is established under federal labor law that punitive

damages may not be awarded for grievances of the kind alleged in the fourth and fifth claim. See *Vaca v. Sipes*, 386 U.S. 171, 195, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). It is likewise our view that, under federal labor law, individual union members are not liable in damages by reason of conduct such as plaintiffs charge against the personal defendants. 29 U.S.C. § 185(b), *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 245, 82 S.Ct. 1318, 8 L.Ed.2d 462 (1962). [Footnote omitted.]

And, the Ninth Circuit's understanding that the *Vaca* Court took the unavailability of punitive damages as given is supported by several substantial considerations.

First, the Court stressed that the union's obligation as exclusive representative "fairly to represent all" the employees in the covered bargaining unit is a "statutory duty". (386 U.S. at 177.) As we have seen, it is well-settled that a central feature of the statute that gives rise to that duty is that only remedial sanctions are available.

Second, *Vaca* reaffirms the proposition established in *Humphrey v. Moore*, 375 U.S. 335, 343-344, that where a complaint "charg[ing] a breach of duty by the union in the process of settling * * * grievances * * * under the collective bargaining agreement" is filed,

[the] action is one arising under § 301 of the Labor Management Relations Act and is a case controlled by federal law, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, even though brought in the state court. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95; *Smith v. Evening News Assn.*, 371 U.S. 195. Although there are differing views on whether a violation of the duty of fair representation is an unfair labor practice under the Labor Management Relations Act, it is not necessary for us to resolve that difference here. Even if it is, or arguably may be, an unfair labor practice, the complaint here alleged that Moore's discharge would vio-

late the contract and was therefore within the cognizance of federal and state courts, *Smith v. Evening News Assn.*, *supra*, subject, of course, to the applicable federal law. [Footnotes omitted.]

And, as Mr. Justice White added in *Vaca*:

[W]e think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance. We may assume for present purposes that such a breach of duty by the union is an unfair labor practice, as the NLRB and the Fifth Circuit have held. The employee's suit against the employer, however, remains a § 301 suit, and the jurisdiction of the courts is no more destroyed by the fact that the employee, as part and parcel of his § 301 action, finds it necessary to prove an unfair labor practice by the union, than it is by the fact that the suit may involve an unfair labor practice by the employer himself. The court is free to determine whether the employee is barred by the actions of his union representative, and, if not, to proceed with the case. And if, to facilitate his case, the employee joins the union as a defendant, the situation is not substantially changed. The action is still a § 301 suit, and the jurisdiction of the courts is not pre-empted under the *Garmon* principle. This, at the very least, is the holding of *Humphrey v. Moore*, *supra*, with respect to pre-emption, as petitioners recognize in their brief. And, insofar as adjudication of the union's breach of duty is concerned, the result should be no different if the employee, as Owens did here, sues the employer and the union in separate actions. There would be very little to commend a rule which would permit the Missouri courts to adjudicate the Union's conduct in an action against Swift but not in an action against

the Union itself. [386 U.S. at 186-187, footnote omitted.]

The law concerning punitive damages in a § 301 action is the same as that stated in *Republic Steel and Morton*. The leading case is *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277, where the Third Circuit, sitting *en banc*, held that punitive damages are not available in a suit under § 301 for breach of contract, even though the same conduct is also an unfair labor practice (the circumstance relied on by the Judges who dissented on this point). Chief Judge Biggs wrote in pertinent part:

* * * Section 303 of the Labor Management Relations Act, as amended, 29 U.S.C.A. § 187 (1960 Supp.), indicates that Section 301 of the Act, 29 U.S.C.A. § 185 (1956), does not contemplate the imposition of punitive awards. Congress in dealing with the tortious conduct prohibited by the Act clearly limited recovery to compensatory damages and costs. Note the language of Section 303(b) which provides that the injured employer "shall recover the damages by him sustained and the cost of the suit." See *United Mine Workers of America v. Patton*, 211 F.2d 742, 749-750, 47 A.L.R.2d 850 (4 Cir.), cert. denied, 348 U.S. 824, 75 S.Ct. 38, 99 L.Ed. 649 (1954). If my assumption be correct Congress should not be credited with the intention of authorizing punitive awards for causes of action arising under Section 301, the contract section, of the law. It is the general policy of the federal labor laws, to which the federal courts are to look for guidance in Section 301 actions, to supply remedies rather than punishments. This was indicated by the Supreme Court in *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 10-13. [298 F.2d at 284, concurring opinion, emphasis added.]

See also *id.* at 285-286 (opinion of Kalodner, J., concurring on this point):

Judge STALEY recognizes that "As a general rule, punitive damages are not recoverable in an action for breach of contract," but makes an exception here because the breach of contract was in "disregard of a duty imposed by law independently of contract", to wit, Section 8 of the National Labor Relations Act.

On this score one needs go no further than to point out that in *Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940) where it was held that punitive damages cannot be imposed by the National Labor Relations Board in a Section 8 violation.

The basic thrust of both the substantive and damage allocation rules announced in *Vaca* is to assure that where "the employer has committed a wrongful discharge in breach of that agreement" and the union breaches its duty of fair representation in prosecuting a grievance, the injured employee is not "deprive[d] of all remedies for breach of contract", and employers are not shielded "from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements". (386 U.S. at 185-186; compare *id.* at 196-198.) It would, to say the least, be anomalous if a body of law designed to place an employee covered by a collective agreement in the place he would have occupied if the union had pressed his grievance properly were to provide that employee an opportunity to recover punitive damages even though he would only have been entitled to a compensatory remedy had the grievance run its course.

Third, the two considerations just noted are mutually reinforcing. Both the NLRA and § 301 provide only remedial, and not punitive, sanctions. The logic of the situation is that sanctions for a breach of the duty derived from these sources must also be remedial, and not punitive. It is beyond the generative capacity of such parents to produce an offspring so completely unlike themselves.

Of course, if the *Vaca* opinion states the broader of the two possible holdings just outlined, that authority would require reversal of the punitive damage award here, unless, contrary to our submission at pp. 11-13 and 24-25, a distinction were to be made between NLRA-LMRA fair representation cases and those under the RLA. If, however, the narrower reading is the correct one, then given the procedural posture of this case and the limited grant of certiorari, the propriety of that award would be a question of first impression in this Court.

(4). Before turning to the possible distinction between NLRA and RLA fair representation law, it is instructive, we believe, to discuss the line of demarcation between the precedents just reviewed and the line of authority from *United Workers v. Laburnum Corp.*, 347 U.S. 656, and *Automobile Workers v. Russell*, 356 U.S. 644, through *Farmer v. Carpenters*, 430 U.S. 290, permitting the award of punitive damages where the claim grows out of a labor dispute but is based on the state law of torts. The point of the *Laburnum-Russell* line is that in certain respects the federal law does not displace the state's remedial scheme. It is precisely because those cases are governed by *state* not federal law that punitive damages are recoverable and that the Court in *Russell* deemed irrelevant, and did not address, the thorough analysis in Chief Justice Warren's dissenting opinion of the reasons why national labor policy strongly disfavors punitive damages (356 U.S. at 650-659). The majority recognized that "[t]o the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts." (*Id.* at 646, citing *Republic Steel*, *supra*.)

But even in those instances in which the states retain their authority to apply their own substantive laws to labor disputes, this Court has restricted the states' freedom to award punitive damages. In *Linn v. Plant Guard Workers*, 383 U.S. 53, 66, the Court held that in state law

defamation suits arising out of labor disputes—which *Linn* permitted to go forward—“the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages.” As a further constraint it declared that “[i]f the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial.” (*Id.* at 65-66.) The Court has deemed it necessary to reiterate that admonition. *Letter Carriers v. Austin*, 418 U.S. 264, 287, n. 17 (defamation); *Farmer v. Carpenters Union*, 430 U.S. 290, 306 (intentional infliction of mental suffering).¹²

B. *The Language of the RLA.* The Third Circuit in *Deboles* concluded:

There is no indication that the Railway Labor Act deviates from this general pattern of remedies [under the NLRA] at least with respect to union misconduct. Reballoting is the statutory remedy for instances where a vote has been impaired by misconduct of the carrier. Section 2 (Ninth) of the Railway Labor Act, 42 U.S.C. § 152 (Ninth). Criminal sanctions are imposed by Section 2 (Tenth) of the Act upon carriers (and not unions) but only with respect to willful failure or refusal of a carrier to comply with the certain of the Act's duties, such as the duty to refrain from interference with the organization chosen by the employees. 42 U.S.C. § 152 (Tenth). [552 F.2d at 1019.]

¹² In *Letter Carriers*, a defamation action arising out of a labor dispute among employees of the post office whose labor relations were then governed by a federal executive order, the jury awarded to each of three plaintiffs \$10,000 in compensatory damages and \$45,000 in punitive damages. (See 418 U.S. at 269.) In *Farmer*, the jury had awarded the plaintiff \$7,500 in compensatory damages and \$175,000 in punitive damages. (See 430 U.S. at 294.) In both cases these verdicts were left undisturbed by the trial court.

As *Deboles* indicates, the materials on the RLA's remedies are sketchy. That Act does not expressly provide for civil remedies for violation of its duties—even those which it expressly declares. This Court, however, early held that the Railway Labor Act of 1926, “impose[d] certain definite obligations enforceable by judicial proceedings” (*Texas & N.O.R. Co. v. Brotherhood Ry. & S.S. Clerks*, 281 U.S. 548, 567), and that holding has repeatedly been reaffirmed (see, e.g., *Virginian Railway Co. v. System Federation No. 40*, 300 U.S. 515, 545; *Chicago & N.W.R. Co.*, *supra*, 402 U.S. at 578-581). But these cases do not address the availability of punitive damages in such “judicial proceedings.”

Section 2 Tenth, to which the *Deboles* Court referred, provides in full:

The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed

to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Excluded from § 2, Tenth, are those statutory duties which are most closely related to the judicially implied duty of fair representation—those declared in §§ 2, First and Second. As this Court said in *Steele*, (323 U.S. at 200):

Section 2, Second, requiring carriers to bargain with the representative so chosen, operates to exclude any other from representing a craft. *Virginian R. Co. v. System Federation*, *supra*, 545. The minority members of a craft are thus deprived by the statute of the right, which they would otherwise possess, to choose a representative of their own, and its members cannot bargain individually on behalf of themselves as to matters which are properly the subject of collective bargaining. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, and see under the like provisions of the National Labor Relations Act *J. I. Case Co. v. Labor Board*, 321 U.S. 332, and *Medo Photo Supply Corp. v. Labor Board*, 321 U.S. 678.

Moreover, the duty of fair representation attaches to the unions' performance of the obligations declared in § 2, First,

to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Thus, this Court said in *Graham v. Brotherhood of F.L. & E.*, 338 U.S. 232, 239:

The right [to be fairly represented] is analogous to the statutory right of employees to require the employer to bargain with the statutory representative of a craft, a right which this Court has enforced and protected by its injunction in *Texas & New Orleans R. Co. v. Brotherhood of Clerks*, *supra*, 556-557, 560, and in *Virginian R. Co. v. System Federation*, *supra*, 548, and like it is one for which there is no available administrative remedy." *Steele v. Louisville & Nashville R. Co.*, *supra*, 207. And see *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen*, *supra*, 213.

As § 2, First, makes clear by its terms, such bargaining includes both making agreements and settling disputes arising out of their application. (See *e.g.*, *Elgin, J. & E. R. Co. v. Burley*, *supra*, 325 U.S. at 721, n. 18, on rehearing, 327 U.S. at 665, n. 6.) The relationship between the bargaining obligations declared in § 2, First, and the duty of fair representation is lucidly explained in *Conley v. Gibson*, 355 U.S. 41, 46:

The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. A contract may be fair and impartial on its face yet administered in such a way, with

the active or tacit consent of the union, as to be flagrantly discriminatory against some members of the bargaining unit. [Footnote omitted.]

The short of the matter is this. A carrier could not be punished under § 2 Tenth, for failure to bargain in good faith for a collective agreement, or for failure to observe an obligation spelled out in such an agreement. The fair inference is that if Congress had spelled out the duty of fair representation, it would not have subjected that duty to the sanction of § 2 Tenth. And, it follows that a union may not be subjected to punitive damages for breaching that duty. Congress has deviated from its general labor policy against punitive remedies only by subjecting a carefully confined category of *carrier* violations to the criminal law, which provides both penalties and substantial procedural safeguards not included in the civil law; those penalties insofar as they include fines are controlled by the \$20,000 limit per violation. Since the legislature has gone that far but no further, it would be improper to permit punitive damages in civil suits against unions for a breach of an obligation outside the scope of § 2, Tenth.

C. *The Opinion Below.* In sustaining the award of punitive damages the court below discussed neither the national labor policy nor the RLA's language and structure. That court dismissed *Vaca* without stating what it believed to be the basis for this Court's rejection of punitive damages in that case. And, the Court of Appeals put aside the analysis of the issue in *Deboles* as "[d]icta", a characterization which is incorrect,¹³ and

¹³ As the Third Circuit explained, in the absence of injury proximately caused by the misrepresentation which constituted the breach of the union's duty, "any remedy against the union would necessarily be a 'punishment' for a harmless lie" (552 F.2d at 1019). On that entirely sound premise the plaintiffs could obtain damages against the union without proving that they had suffered any injury proximately caused by the violation only if punitive damages are recoverable under the RLA.

which in any event cannot justify total disregard of the Third Circuit's reasoning. Nor did the lower court even mention three decisions, cited in the appellants' brief, in which punitive damages were held to be unavailable in a suit for breach of the duty of fair representation: *Williams v. Pacific Maritime Assoc.*, 421 F.2d 1287, 1289 (C.A. 9)¹⁴; *Brady v. Trans World Airlines, Inc.*, 196 F.Supp. 504, 506-507 (D. Del.), affirmed without reaching this issue, 401 F.2d 87, 105 (C.A. 3), cert. denied, 393 U.S. 1048¹⁵; and an earlier case in the U.S. District Court for the District of Wyoming, *Crawford v. Pittsburgh-Des Moines Steel Co.*, 386 F.Supp. 290.¹⁶ One of

¹⁴ Quoted at pp. 18-19, *supra*.

¹⁵ Chief Judge Caleb M. Wright wrote:

Plaintiff's second statutory basis for this action is the duty of a union to bargain fairly on behalf of those it represents and not to act with "hostile discrimination" towards members of the bargaining unit. *Steele v. Louisville & N. R. Co.*, 1944, 323 U.S. 192, 203. Although the rationale that express statutory authority is necessary to award punitive damages as a remedy for violations of a federal statute is somewhat inapposite where the statutory duty itself is only implicit, the Court does not believe the *Steele* doctrine authorizes such relief. No case has yet gone so far. Moreover, the very threat of punitive damages, as a remedy for violations of a duty which in effect limits the scope of collective bargaining between labor and management, may have unforeseeable effects upon the institution of free collective bargaining itself. In this situation, the fact that the duty itself has been read into the Act by the courts may well be cause to limit the relief obtainable to equitable remedies and compensatory damages. Because of this danger, the duty itself has been restricted by the courts and gives only limited protection. Under these circumstances, the Court does not believe punitive damages may be recovered in actions based upon the *Steele* doctrine. [196 F. Supp. at 504-505, footnotes omitted.]

See also Judge Wright's discussion with respect to the first cause of action (based on § 2, Eleventh, of the RLA), *id.* at 506, quoted at p. 33, *infra*.

¹⁶ Judge Kerr wrote:

Punitive damages are, by their very nature, designed not to compensate for losses sustained but to punish for wrongs done.

the ironies here is that the Court of Appeals approved the District Court's unexplained refusal in this case to follow a prior decision of another judge of the same District Court, and did so without stating why it disagreed with the reasoning of the earlier decision.

The Court of Appeals did advert to *Butler v. Local U. 823, Int. Bro. of Teamsters, etc.*, 514 F.2d 442, 454 (C.A. 8), in which an award of punitive damages was reversed. In *Butler*, the Eighth Circuit only assumed "arguendo" that punitive damages would ever be proper against an employer for breach of contract or against a union for breach of the duty of fair representation.¹⁷

The single case cited below which did sustain a punitive damage award is *Harrison v. United Transp. Union*, 530 F.2d 558 (C.A. 4), cert. denied, 425 U.S. 958. The *Harrison* court opined that because:

Though not free of doubt, entirely, it would appear that the claim for punitive damages as against the Union cannot stand, see *Vaca v. Sipes*, above; see also *Local 127, United Shoe Workers v. Brooks Shoe Manufacturing Co.*, 298 F.2d at 284, above, wherein an award for punitive damages under 29 U.S.C.A. § 185 was disallowed; the appellate court, noting that the general purpose of the federal labor laws is to supply remedies, rather than punishment, stated, "[T]he type of relief contemplated under Section 301 was remedial as distinguished from punitive." Accord, *Williams v. Pacific Maritime Association*, 421 F.2d 1287 (9th Cir. 1970). The claim for punitive damages as against the union is therefore one for which relief cannot be granted and the motion to strike this claim is granted. (386 F. Supp. at 295.)

¹⁷ The Court below also cited another Eighth Circuit case, *Emmanuel v. Omaha Carpenters Dist. Council*, 560 F.2d 382, 386, which likewise left that issue open.

The decision below notes that "[t]he *Butler* court also mentioned that the federal courts should fashion remedies under the labor statutes with a view to achieving a goal of industrial peace." (Pet. 18a.) But the Tenth Circuit did not indicate whether it agreed with that proposition nor state whether punitive damages would promote that objective, let alone how. The only opinions discussing the effect of such damages have expressed the view that punitive remedies disserve industrial peace. See pp. 32 and 33, *infra*.

[I]t is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be *de minimis*, * * * unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation * * * even in those cases where compensatory damages may be merely nominal. [530 F.2d at 563, citing *Basista v. Weir*, 340 F.2d 74, 87 (C.A. 3) (punitive damages are recoverable in suits under 42 U.S.C. § 1983).]

Since the availability of punitive damages under 42 U.S.C. § 1983 was expressly reserved last Term in *Carey v. Phipps*, 435 U.S. 247, 257, n.11, the *Basista* line of authority does not provide a basis in precedent for the punitive damage award here. Moreover, with dockets already crowded by lawsuits brought by persons who have suffered actual injury and seek recompense therefore, it may well be questioned whether it is a wise allocation of judicial resources to encourage litigation solely for its punitive or deterrent effect. In any event, for present purposes, it suffices that this asserted justification for punitive damages is wholly unacceptable in the labor relations context.

As we have shown earlier, pp. 17-18, the *least* that *Vaca* can be said to have decided with respect to punitive damages is that they may not be recovered against a party which is liable for no or only minimal compensatory damages. (See also *Linn v. Plant Guard Workers*, *supra*, 383 U.S. at 66, discussed at pp. 23-24, *supra*.¹⁸)

¹⁸ While *Linn's* substantive restrictions on state defamation actions arising out of labor disputes were based on an analogy to *New York Times Co. v. Sullivan*, 376 U.S. 254, its holding that punitive damages may not be recovered in such cases absent compensatory damages has not been adopted outside the labor relations context. Cf. *Rosenbloom v. Metromedia*, 403 U.S. 29, 72-77, where only Mr. Justice Harlan proposed such a rule as a matter of

To foster litigation by providing employees with potential windfalls is wholly inconsistent with the national labor policy. The practical realities underlying that policy were succinctly stated by Chief Justice Warren dissenting in *Russell, supra*:

In Alabama, as in many other jurisdictions, the theory of punitive damages is at variance with the curative aims of the Federal Act. The jury in this case was instructed that if it found that the defendant was "actuated by ill-will" it might award "smart money" (punitive damages) "for the purpose of making the defendant smart" The parties to labor controversies have enough devices for making one another "smart" without this Court putting its stamp of approval upon another. I can conceive of nothing more disruptive of congenial labor relations than arming employee, union and management with the potential for "smarting" one another with exemplary damages. Even without the punitive element, a damage action has an unfavorable effect on the climate of labor relations. Each new step in the proceedings rekindles the animosity. Until final judgment the action is a constant source of friction between the parties. [356 U.S. at 653, footnote omitted.]

The foregoing is, of course, not authoritative as precedent, but the force of the late Chief Justice's reasoning merits approval.¹⁹ So, too, the District Court in *Brady, supra*, correctly reasoned:

constitutional law in defamation cases. Cf. the dissenting opinion of Justice Marshall, joined by Justice Stewart in *Rosenbloom, id.* at 81-87 and the Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-350, discussed at pp. 42-43, *infra*.

¹⁹ The majority in *Russell* did not disagree with this observation, but rather held that since federal law did not preempt the state's authority to act, it was for the state to determine the sanctions for violations of its law. (See p. 23, *supra*.)

Moreover, the regulation of the economic relations between labor and management is an exceedingly delicate matter, and this Court is unwilling to employ the crude device of punitive damages as a remedy in causes founded on a detailed and pervasive federal statutory scheme without express authorization from Congress. See *United Mine Workers of America v. Patton*, 4 Cir., 1954, 211 F.2d 742, 47 A.L.R. 2d 850. [196 F.Supp. at 506.]

As the *Brady* opinion indicates, in *Harrison* the Fourth Circuit not only disregarded the pertinent precedents in this Court but also its own earlier soundly-reasoned decision on punitive damages in *United Mine Workers v. Patton, supra*. Much of what Chief Judge Parker there wrote is equally in point here:

Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute, it has found no difficulty in using language appropriate to that end. Thus, in copyright cases, 17 U.S.C.A. § 1, in patent cases, 35 U.S.C.A. § 284, and in anti-trust cases, 15 U.S.C.A. § 15, the right to recover treble damages is expressly given. There is nothing in the language of the statute here under consideration [§ 303 of the LMRA], however, or in its history, that indicates that Congress intended that anything more than actual damages be recovered.

In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 4 Cir., 167 F.2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act, 45 U.S.C.A. § 151 et seq., to the effect

that, "The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate." We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions. [211 F.2d at 749-750.]

Our demonstration to this point calls for the conclusion that punitive damages are not recoverable in the instant case. But we have concluded this portion of our discussion by quoting the *Patton* opinion, not only because of its perceptive observations concerning the national labor policy, but also because at least implicit in Judge Parker's analysis is what appears to us to be a sound approach to the problem of determining whether punitive damages are recoverable in suits to vindicate rights or enforce duties under federal statutes generally.

D. *A Generally Applicable Principle of Construction.* *Patton* contrasts certain federal statutes, in which "the right to recover treble damages is expressly given", with the statute at issue (§ 303 of the LMRA), the language and history of which contain "nothing" that "indicates that Congress intended that anything more than actual damages be recovered." (211 F.2d at 749, see p. 33, *supra*, where this paragraph of the opinion is quoted in full.²⁰) Judge Parker thus drew from the fact that Congress had in some statutes expressly provided for dam-

²⁰ While the evidence from the history of § 303 which Judge Parker there arrayed actually negated an intent to permit punitive damages, this only served to strengthen his ultimate conclusion.

ages in excess of those actually sustained by the plaintiff the proposition that the intent to allow such damages under a federal statute should be attributed to Congress only if such intent affirmatively appears in the statute's language or from its legislative history. For the reason we now develop, we submit that this is the proper rule of construction.

(1). Legislative developments since the *Patton* case was decided reinforce its premise that Congress knows how to provide for damages in excess of actual losses when it wishes to do so.²¹ In addition to the copyright, patent and antitrust laws which were referred to in the *Patton* opinion, there are now, for example, Title VIII of the Civil Rights Act of 1968²², Title III of the Omni-

²¹ This Court has equated "exemplary damages for fraud [with] the punitive two-thirds portion of a treble damage antitrust recovery." (*Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 427.) See also, L. Hand, J. in *Lyons v. Westinghouse Electric Corporation*, 222 F.2d 184, 189 (C.A. 2): "The remedy provided is not solely civil; two-thirds of the recovery is not remedial and inevitably presupposes a punitive purpose."

We note, however, that not all recoveries in excess of single damages are punitive in nature. For example, § 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b), provides that an employee may recover unpaid minimum wages of unpaid overtime compensation and "an additional equal amount as liquidated damages." These liquidated damages "are compensation, not a penalty or punishment by the Government. The retention of a workman's pay may well result in damages too obscure and difficult of proof for estimate other than by liquidated damages." (*Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572, 583.)

²² Public Law 90-284, 82 Stat. 73 *et seq.* Section 812(c) of the Act, 82 Stat. 88, 42 U.S.C. § 3612(c) provides that in a civil suit to enforce §§ 803-806 of the Act:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

bus Crime Control and Safe Streets Acts of 1968²³; the Bank Holding Company Act Amendments of 1970²⁴; the Equal Credit Opportunity Act²⁵; and the Truth in Lending

²³ Public Law 90-351, 82 Stat. 197 *et seq.* Section 802, 82 Stat. 223, amended 18 U.S.C. § 2520 to provide in pertinent part:

Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use such communications, and (2) be entitled to recover from any such person—

(a) actual damages but not less than liquidated damages computed at the rate of \$100 a day for each day of violation or \$1,000, whichever is higher;

(b) punitive damages; and

(c) a reasonable attorney's fee and other litigation costs reasonably incurred. * * *

²⁴ Public Law 91-607, 84 Stat. 1760 *et seq.* Section 106(e), 84 Stat. 1767 (12 U.S.C. § 1975(e)) provides:

Any person who is injured in his business or property by reason of anything forbidden in section 106(b) of this Act may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

²⁵ Title V of Public Law 93-495, 88 Stat. 1521 *et seq.*, adding a new Title VII to Public Law 90-321, 82 Stat. 146. As amended in 1976 by § 6 of Public Law 94-239, 90 Stat. 253, 15 U.S.C. § 1691(e), the civil liability provision enforcing the Equal Credit Opportunity requirements provides in pertinent part as follows:

(a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

(b) Any creditor, other than a government or governmental subdivision or agency, who fails to comply with any require-

Act.²⁶ And, when Congress revised and codified the copy-

ment imposed under this subchapter shall be liable to the aggrieved applicant for punitive damages in an amount not greater than \$10,000, in addition to any actual damages provided in subsection (a) of this section, except that in the case of a class action the total recovery under this subsection shall not exceed the lesser of \$500,000 or 1 per centum of the net worth of the creditor. In determining the amount of such damages in any action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

The 1976 amendments raised the total amount recoverable in a class action from \$100,000 to \$500,000. Compare Public Law 93-495, § 503, 88 Stat. 1524.

²⁶ Public Law 90-321, 82 Stat. 146 *et seq.* Originally, § 130 of the TILA provided a civil penalty of twice the amount of the finance charge imposed, but no less than \$100. See *Mourning v. Family Publications Service*, 411 U.S. 356, 376. As most recently amended by § 4 of Public Law 94-240, 90 Stat. 260, the civil liability provision, 15 U.S.C. § 1640, provides in pertinent part as follows:

(a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than \$100 nor greater than \$1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the

right law, it gave the copyright owner the option of suing to recover actual damages and profits or statutory damages, the amount of which was also detailed.²⁷

lesser of \$500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

²⁷ 17 U.S. § 504(c), 90 Stat. 2585 provides as follows:

(1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally, in a sum of not less than \$250 or more than \$10,000 as the court considers just. For the purposes of this subsection, all the parts of a compilation or derivative work constitute one work.

(2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$50,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court [in] its discretion may reduce the award of statutory damages to a sum of not less than \$100. The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who, or such institution, library, or archives itself, which infringed by reproducing the work in copies or photorecords; or (ii) a public

(2). Consideration of the special characteristics of punitive damages lends further support to the rule of construction which we propose. It does so whether the focus is on the avowed objectives of that remedy, or on the criticisms which have been raised against it. As was succinctly stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350, punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."²⁸ But these purposes do not provide a principled basis for determining under what statutes punitive damages should be permitted. Whenever Congress passes a law declaring certain conduct unlawful, it plainly wishes, at the very least, to deter that conduct. Whether certain means—in this instance, punitive damages payable to a private party—advance that goal, and even if so, whether that means in some way endangers other Congressional objectives, are paradigm examples of the elusive policy decisions which, in our democratic system, the legislature rather than the courts should make. So, too, is the judgment whether the forbidden conduct is so undesirable or contrary to the good order of the community that offenders should be subject to punishment, and if so, whether the punishment should take the form of a private fine.

Punitive damages have also been defended as

a partial remedy for the defect in American civil procedure which denies compensation for actual ex-

broadcasting entity which or a person who, as a regular part of the nonprofit activities of a public broadcasting entity (as defined in subsection (g) of section 118) infringed by performing a published nondramatic literary work or by a reproducing a transmission program embodying a performance of such a work.

²⁸ See also Prosser, *Torts*, p. 9 (4th ed. 1971): "Such damages are given to the plaintiff over and above the full compensation for his injuries, for the purpose of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example.

penses of litigation, such as counsel fees, and as an incentive to bring into court and redress a long array of petty cases of outrage and oppression which in practice escape the notice of prosecuting attorneys occupied with serious crime, and which a private individual would otherwise find not worth the trouble and expense of a lawsuit.²⁹

But punitive damages are a clumsy and inexact substitute for attorney's fees, since they are available only in a certain class of cases, and in those cases in which they may be awarded, normally bear no relationship to the plaintiff's actual litigation expenses, and are usually far greater. Even more to the point, when Congress wishes to provide attorney's fees for successful plaintiffs it knows how to do so, as, for example, in § 718 of Title VII, the Emergency School Aid Act, 20 U.S.C. § 1617 (1970 ed., Supp. II), (part of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, 369); and, the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, Pub. L. 94-559. Congress has also shown that it is fully capable to determine whether to encourage private litigation, and when it wishes to do so, to select the appropriate degree of encouragement, be it to authorize attorney's fees to the plaintiff, or to permit recovery of more than actual damages. (See pp. 35-38, *supra*.) Mr. Justice Jackson has indicated the delicacy of that task in outlining the competing considerations for and against commissioning such private attorneys general:

Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute are identical with the public interest in having a statute enforced, it is not uncommon to permit them to invoke sanctions. This

²⁹ *Id.*, p. 11. Dean Prosser was not endorsing punitive damages but was outlining the arguments which have been advanced for and against them.

stimulates one set of private interests to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. Such private remedies lose, of course, whatever advantage there may be in the presumed disinterested, public interest standards and expertness of a governmental agency which has the initiative control of retributory measures. It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee. [*Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751-752.]³⁰

In selecting a rule of determining whether punitive damages should be permitted in a claim arising under a federal statute where neither the language nor the legislative history shows that Congress contemplated this

³⁰ The court below does not appear to have made any independent examination of the propriety of permitting punitive damages. If its reference to *Harrison* is to be taken as adopting the Fourth Circuit's reasoning on this point, then the decision below rests on the supposed desirability of encouraging fair representation litigation. See 530 F.2d at 563 quoted and discussed at 30-33, *supra*. A further objection to that theory is that punitive damages encourage vexatious as well as meritorious litigation. (Cf. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737-744.) Because the potential recoveries are so great, suit may be brought on the mere hope that the court will allow the case to go to the jury and that the jury will return a sizeable verdict. Moreover, because defendants cannot estimate the extent of their potential exposure with any degree of accuracy, extraordinary pressure is placed on them to settle claims even though they reasonably believe that they have committed no violation and should have to pay no damages.

remedy its disadvantages must also be considered, Cf. *Blue Chip Stamps*, *supra*, 421 U.S. at 737.

Since our point is not that punitive damages are to be banned, but rather that they should be permitted in an action arising under a federal statute only when Congress has made clear that it so intends, we shall not here rehearse all the criticisms of this doctrine. But we deem particularly pertinent in this connection the severe strains which this harsh remedy imposes on the primary responsibility of the courts to accord to all parties a fair trial. When a plaintiff claims punitive damages he may introduce evidence of the defendant's wealth because it is deemed relevant to determining the amount of damages necessary to deter or punish the defendant; yet such evidence is normally inadmissible because it is irrelevant to the merits of the case, and because of its serious potentially prejudicial effect. Additionally, the effort to maximize the award inevitably leads to inflammatory jury arguments by plaintiff's counsel, likewise unrelated to the merits.³¹ Both cannot help but infect consideration of the issues of liability and the amount of compensatory damages.

As Mr. Justice Powell wrote for the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350:

In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views.

³¹ See, for example, counsel's argument in this case charging the union with "disdain" for the jury because the individual defendants did not appear in court (A. 58).

And as Mr. Justice Marshall explained, dissenting in *Rosenbloom v. Metromedia*, 403 U.S. 29, 84:

The unlimited discretion exercised by juries in awarding punitive and presumed damages compounds the problem of self-censorship that necessarily results from the awarding of huge judgments. This discretion allows juries to penalize heavily the unorthodox and the unpopular and exact little from others. Such free wheeling discretion presents obvious and basic threats to society's interest in freedom of the press. And the utility of the discretion in fostering society's interest in protecting individuals from defamation is at best vague and uncertain. These awards are not to compensate victims; they are only windfalls. Certainly, the large judgments that can be awarded admonish the particular defendant affected as well as other potential transgressors not to publish defamation. The degree of admonition—the amount of the judgment in relation to the defamer's means—is not, however, tied to any concept of what is necessary to deter future conduct nor is there even any way to determine that the jury has considered the culpability of the conduct involved in the particular case. Thus the essence of the discretion is unpredictability and uncertainty.

While the foregoing were written in the context of state law defamation suits, the lack of standards to confine the amount awarded is endemic to the punitive damage remedy. Because of this sweeping discretion, juries are enabled to punish not only unpopular views but also unpopular defendants.³²

³² See, e.g., in addition to the cases cited at p. 24, n.12, *supra*: *United Workers v. Laburnum Corp.*, *supra*, 347 U.S. at 658 (\$100,000 punitive damages); *Lassiter v. Operating Engineers Union*, 349 So. 2d 622 (Fla. Sup. Ct.) (setting aside on evidentiary grounds a punitive damage award of \$700,000 against a national union and \$300,000 against a local union in a claim arising

Punitive damages, in short, are strong medicine. Their potential adverse consequences often are more harmful than the disease sought to be cured. The calculation of when there will be a beneficial effect is complex. And, precisely for that reason, that remedy should not be administered unless the prescription has been written by Congress.³³

Since there plainly is no evidence in the RLA that Congress contemplated the award of punitive damages for the type of wrong the jury found occurred here, the award of those damages should therefore be reversed.³⁴

out of a local officer's assault on a member); *New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 262 (\$500,000 verdict, not differentiated between compensatory and punitive damages, against publisher and individual civil rights leaders); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 138 (punitive damage verdict of \$3,000,000, reduced to \$400,000 by trial court); *NAACP v. Overstreet*, 384 U.S. 118, 119, dissenting opinion (\$50,000 punitive damage verdict for tortious consumer picketing).

³³ Because we are proposing a rule for the construction of federal statutes, the long line of cases in this Court beginning with *Day v. Woodworth*, 13 How. (54 U.S.) 363, which permit the award of punitive damages does not militate against our proposal. For *Day* was a common law action of trespass for tearing down and destroying a mill dam, brought in the federal courts under the diversity jurisdiction (13 How. at 363); the issue of punitive damages was decided there, and in the many cases following *Day* under the aegis of *Swift v. Tyson*, 16 Pet. (41 U.S.) 1. Since that method of decision has been discredited by *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, it is now clear that the federal courts must apply the state law of punitive damages when a claim arises under state law and must derive from the federal statute and its policy the scope and nature of a lawful claim. The passage from *Steele*, quoted at the outset of our argument, p. 9, *supra*, is but one of countless instances where the latter obligation has been recognized.

³⁴ We recognize, of course, that since the duty of fair representation and the civil action to enforce that duty were implied from the RLA, that no evidence could possibly be found that Congress intended punitive damages would be available to indicate that particular right. But this is not a valid objection either to our proposal or to its applicability herein. In this connection it is necessary for clarity of analysis to bear in mind the distinction be-

II. PUNITIVE DAMAGES COULD NOT PROPERLY BE AWARDED ON THIS RECORD.

We accept, as we must, given the limited grant of certiorari, that the Union, by filing Foust's grievance two days out of time, breached its duty of fair representa-

tween judicial implication of a duty and judicial implication of a private cause of action for breach of an express or implied duty. (We happen in the present case to be dealing with a situation in which both the duty and the right to sue are implied. When the *Steele* Court implied the duty of fair representation, it inevitably followed *Texas & N.O.R. Co.*, *supra*, and *Virginian Railway Co.*, *supra* (p. 25, *supra*), which had implied a private action to enforce the duties which are expressly declared in the RLA. (See *Steele*, 323 U.S. at 207.)

First, The rule we propose does not require that Congress be shown to have contemplated the specific type of claim; our test would be met by a showing that the legislature intended that remedy to be available for claims generally under the same statute. Thus, if a statute provided for private actions in which punitive damages were recoverable for claims based on violations of an express duty, such damages would, under our thesis, be available also in suits to enforce implied duties. Of course, where Congress differentiates between claims which do, and those which do not give rise to a claim for punitive damages under a statute the Court's task would be to find the most fitting analogy. (Compare our discussion of § 2, Tenth of the RLA at pp. 25-28, *supra*.)

Second, it by no means follows from the fact that a cause of action for compensatory damages to enforce statutory rights (either express or implied) may properly be implied, that a cause of action for punitive damages may also be implied. To cite a familiar example, an implied cause of action has been recognized under § 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934, but punitive damages have consistently been disallowed by the Courts of Appeals. (See, e.g., *Green v. Wolf Corp.*, 406 F.2d at 291, 302-303 (C.A. 2), cert. denied, 395 U.S. 977; *Baumel v. Rosen*, 421 F.2d 571, 576 (C.A. 4), cert. denied, 396 U.S. 1037; *De Haas v. Empire Petroleum Co.*, 435 F.2d 1223 (C.A. 10).) Indeed, to go so far as to imply from the substantive provisions of a statute not only that Congress intended enforcement through a private cause of action, but additionally that Congress intended that punitive damages might be recovered in such suits, would be a wholly unwarranted exercise of judicial creativity.

tion. But this is not sufficient to support an award of punitive damages, even if, contrary to our submission in Part I, such damages are sometimes allowable in RLA fair representation cases.³⁵

In *Jones v. Mayer Co.*, 392 U.S. 409, the Court held that the plaintiffs had stated a cause of action under 42 U.S.C. § 1982. In discussing the remedies which would be available to the plaintiffs on remand, and contrasting the remedial scheme of § 1982 with that of the Civil Rights Act of 1968, the Court said: "In no event, on the facts alleged in the present complaint, would the petitioners be entitled to punitive damages." (*Id.* at 415, n.9 continued, citing *Philadelphia, etc. Ry. Co. v. Quigley*, 21 How. (62 U.S.) 202.)³⁶

In *Quigley*, the Court had stated:

In *Day v. Woodworth* this court recognized the power of the jury in certain actions of tort to assess against the tort-feasor punitive or exemplary damages. Whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or indignity, the jury are not limited to the ascertainment of a simple compensation for the wrong committed against the aggrieved person. But the malice spoken of in this rule is not merely the doing of an unlawful or injurious act; the word implies that the wrong complained of was conceived in the spirit of mischief, or criminal in-

³⁵ An additional reason why the jury should not have been permitted to award punitive damages is that the evidence of the defendant union's responsibility for the breach of the duty was insufficient to justify imposition of punitive damages against it. However, this issue was not preserved in the Court of Appeals, and we therefore do not assert this additional ground for reversal here.

³⁶ The Court does not appear to have decided the question whether punitive damages are ever available under 42 U.S.C. § 1982.

differences to civil obligations. [21 How. (62 U.S.) at 213-214.]³⁷

And, in *Carey v. Piphus*, 435 U.S. 247, 257, n.11, although the Court left open the question whether punitive damages can ever be recovered in a suit under 42 U.S.C. § 1983, it squarely held that "there is no basis for such an award in this case. The District Court specifically found that petitioners did not act with a malicious intention to deprive respondents of their rights or to do them other injury * * *; and the Court of Appeals approved only the award of "non-punitive" damages, 545 F.2d 30, 31 (1976)." In the absence of malice punitive damages could not be recovered even though it was established by the proceedings below that the petitioners "should have known that a lengthy suspension without any adjudicative hearing of any type would violate procedural due process." (435 U.S. at 251.)

The standard for the recovery of punitive damages suggested by *Jones* and *Carey* is in accord with the prevailing modern rule. For example, the District of Columbia Circuit recently ruled:

³⁷ See also *Milwaukee, etc. Ry. Co. v. Arms*, 91 U.S. 489, 492, where the Court followed *Quigley* and added:

"Gross negligence" is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term "ordinary negligence;" but, after all, it means the absence of the care that was necessary under the circumstances. In this sense the collision in controversy was the result of gross negligence, because the employees of the Company did not use the care that was required to avoid the accident. But the absence of this care, whether called gross or ordinary negligence, did not authorize the jury to visit the Company with damages beyond the limit of compensation for the injury actually inflicted. To do this, there must have been some willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Nothing of this kind can be imputed to the persons in charge of the train; and the court, therefore, misdirected the jury. [*Id.* at 495].

It is a cardinal rule that punitive damages may be awarded to punish a defendant for the outrageous nature of his conduct and to deter the defendant and others from engaging in the same or similar acts. See, e.g., *Chesapeake & Potomac Telephone Co. v. Clay*, 90 U.S.App.D.C. 206, 194 F.2d 888, 891 (1952); W. Prosser, *Law of Torts*, *supra*, § 2, at 9-10. As such, mere inadvertence or even gross negligence will not suffice to support an award of punitive damages. See *id.* The tort must be "aggravated by evil motive, actual malice, deliberate violence or oppression." *Black v. Sheraton Corp. of America*, 47 F.R.D. 263, 271 (D.D.C. 1969).³⁸

In his treatise, which was cited with approval in *Nader*, Dean Prosser wrote:

Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or "malice," or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton. Lacking this element, there is general agreement that mere negligence is not enough, even though it is so extreme in degree as to be characterized as "gross," an unhappy term of ill-defined content, which occasionally, in a few jurisdictions, has been stretched to include the element of conscious indifference to consequences, and so to justify punitive damages. Still less, of course, can such damages be charged against one who acts under an innocent mistake in engaging in conduct that nevertheless constitutes a tort.³⁹

³⁸ *Nader v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (C.A.D.C.) reversed on another issue, 426 U.S. 290. (Certiorari was not sought with respect to the Court of Appeals ruling on punitive damages, see *id.* at 295.)

³⁹ Prosser, *Torts*, pp. 9-10 (4th ed. 1971) (footnotes omitted).

The Court of Appeals in the present case did not discuss any of the foregoing authorities. It referred only to decisions of the Eighth and Fourth Circuits in duty of fair representation cases, and acknowledged that it was establishing a less demanding standard for awarding punitive damages than was declared in those cases⁴⁰:

We are not convinced that actual animosity or express malice or premeditated malice are essential to the award of punitive damages. Wanton conduct or reckless disregard for the rights of the employee should suffice. [Pet. 18a.]

The court below did not explain what it meant by the terms "wanton conduct" and "reckless disregard". But it is clear that the Tenth Circuit applied a standard totally inconsistent with what we have shown to be the law. That court itself described the defendants' violation in the following terms:

In the case at bar the violation of duty relied upon was the failure of the Union to act within the time provided in the Collective Bargaining Agreement. True, the time available to the Union was limited. This, however, does not excuse their having needless correspondence back and forth and insisting that they have an authorization from the plaintiff with respect to representation by the attorney who is seeking to get them to act. [Pet. 10a.]

We submit that this very statement establishes that the defendants were negligent, but no more than that.

⁴⁰ The court below recognized that in *Butler* (p. 30, *supra*), the "Eighth Circuit expressed the view that in order to have exemplary damages, there had to be express malice." (Pet. 18a. See 514 F.2d at 454.) The court below also observed that in *Harrison*, pp. 30-31, *supra*, the Fourth Circuit "rejected the necessity for having actual malice in the sense of personal animosity." The instruction which was there approved was that the jury "might award punitive damages if it found that UTU acted wantonly or maliciously or that it acted recklessly or in callous disregard of Harrison's rights, or that Harrison's rights were disregarded with unnecessary harshness or severity". (530 F.2d at 563.)

There is nothing here of the kind of aggravated misconduct or "malice" which the authorities require, or even that state of mind normally connoted by the courts' own words, "wanton conduct" and "reckless disregard". And in case more needs to be said, we add the following:

In *Carey v. Piphus*, *supra*, the Court held that punitive damages were not available, even though the defendants should have known that their action denied the plaintiffs' constitutional rights. Here, the evidence, at the very most, permits the inference that the defendants should have known that their "needless correspondence back and forth" would result in the untimely filing of the grievance.⁴¹ The court below acknowledged that "the time available to the Union was limited". The reason that it was so limited was that, of the sixty days provided by the collective agreement, fifty-two days had been used up by plaintiff and his attorney, Mr. Moriarity. As Mr. Moriarity testified:

I recall some time later we waited and kept hoping for a reply and we never got any. I finally called Mr. Jett and Mr. Jett said that, well, they just hadn't had a chance to look at it and that he thought it was going to be final, but he would let me know. And he never let me know and I kept waiting and waiting.

Finally I called him and it was because I was worried; the Rule says something about sixty days that the grievance has to be filed. [A. 52]

It was only after that call, on the fifty-first day, that counsel wrote the Union, asking it to file a grievance. Mr. Moriarity did not cause his client to file the grievance as he clearly was authorized to do under *Elgin, J. & E. Ry Co. v. Burley*, *supra*, 325 U.S. 711, on rehearing, 327 U.S. 661. And, it is that case which generated

⁴¹ The Court of Appeals did not attribute such an inference to the jury; and we do not concede that it could reasonably have been drawn.

the Union officials' concern regarding the sufficiency of counsel's letter as authority to file a grievance on Foust's behalf. For *Burley* held that absent proper authority from the grievant himself, the resolution of the grievance between a union and an employer is not binding on the employee. It may be that insistence on authorization from Foust himself was, as a matter of law, needless, as the Court of Appeals held, but such an error of law cannot give rise to a punitive damage award. Compare *Carey v. Piphus*, *supra*, where the error of law was found to be unjustified.

In sum, if the distinction between negligence and misconduct which justifies punitive damages is to be preserved, the award of punitive damages here must be reversed.

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be reversed and the cause remanded to the District Court with directions to reduce the judgment to \$40,000 by eliminating the award of "\$75,000 punitive or exemplary damages" (A. 90).

Respectfully submitted,

LAURENCE J. COHEN

Sherman, Dunn, Cohen & Leifer
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

WILLIAM J. HICKEY

Mullholland, Hickey, Lyman,
McCormick, Fisher & Hickey
1125 Fifteenth Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN

2101 L Street, N.W.
Washington, D.C. 20037

Of Counsel

LAURENCE GOLD

815 Sixteenth Street, N.W.
Washington, D.C. 20005

Attorneys for Petitioners

Appendices

APPENDIX A

STATUTE INVOLVED

Section 2 of the Railway Labor Act, 44 Stat. 577 (1926) as amended by 48 Stat. 1185 (1934) etc., 45 U.S.C. §§ 151-188, provides as follows:

GENERAL PURPOSES

SEC. 2. The purposes of the Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this Act; (4) to provide for working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purpose of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with manage-

ment during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this Act, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this Act shall be construed to supersede the provisions of any agreement (as to conferences), then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this Act, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral

persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than \$1,000, nor more than \$20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any district attorney of the United States to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United

States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirements of membership in a labor organization in an agreement made pursuant to subparagraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.

APPENDIX B

EXCERPTS FROM DEPOSITION OF DEAN F. JONES

(DEAN F. JONES, called as an adverse party witness by the plaintiff, having been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:)

MR. URBIGKIT: This is a deposition that is taken pursuant to the federal rules by notice. Objections, except to the form of the question, will be reserved for trial.

Is there any other stipulation that you would like to have, Mr. Hickey?

MR. HICKEY: None.

* * *

Q (By Mr. Urbigkit) Directing your attention to the period 1970, '71, at that time did you hold any position as an officer or representative of the International Brotherhood or of the local of the IBEW?

A I did. District chairman.

Q Would you tell me whether district chairman is a position with the local or with the International?

A With the International.

Q And what is the area of your assigned responsibilities as district chairman?

A The area would be the eastern district of the Union Pacific.

Q So that responsibility would encompass more than the local of which you were a member?

A Correct.

Q That's district chairman?

A District chairman.

Q I see. How many positions of like kind would there have been with the Union Pacific in your union?

A At various times it varied. There should have been approximately four of them.

Q When did you assume that responsibility?

A Oh, approximately 1968.

Q How long did it continue?

A Until about 1973 or '74.

Q Would you describe to me the responsibilities of district chairman?

A Filing and handling of claims and grievances of men in the craft.

Q Were there other persons of a like position for the same geographical area with your local?

A No.

* * *

Q (By Mr. Hickey) * * * How much were you paid by the union?

A Nothing.

Q You didn't receive any compensation for your services?

A I never even received postage stamps.

Q Now, you said you held this position as district chairman for some five or six years and that you were headquartered at Rawlins?

A Yes.

Q Did you have offices there or where would you be headquartered?

A It was my point of work.

Q That is where you went to work for the Union Pacific?

A Yes.

Q Where was your office?

A In my house.

Q Oh. You were operating out of your house for no compensation?

A Right.

* * *

Q (By Mr. Hickey) All right, sir. Now, let me ask you this: In your direct examination counsel for the plaintiff asked you if you ever filed a claim on behalf

10a

of an employee subject to your authority as a district chairman or upon the request of an attorney or lawyer representing such an employee.

A Oh, I never have had . . .

Q What is your answer?

A No.

Q You had not?

A No.

Q Had you at any time in the course of your duties as district chairman ever handled any matter or had any dealings with any representative of Union Pacific with respect to any injuries incurred by an IBEW member in the course of his employment with the Union Pacific?

A No.

* * * *

11a

APPENDIX C

LETTERS FROM D. F. JONES TO L. D. FOUST

Rawlins, Wyoming
April 5, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

This with reference to letter of March 26, 1971 received from Attorney Edward P. Moriarity relative to grievance in your behalf.

It is proper procedure for the employee to make his claim or grievance known in writing to the District Chairman for consideration for handling with the Carrier in accordance with provisions of the Agreement. As you are very well aware, Rule 21 provides that all claims or grievances must be presented in writing *by* or on behalf of the employee involved, that is why it is necessary to receive in writing authority to handle claims or grievances for further handling.

Upon receipt of your grievance in writing, and request to the undersigned to handle your initial claim pertaining to the Carrier terminating your service, it will be reviewed and handled under the proper grievance procedures of the current Agreement.

Yours truly,

/s/ D. F. Jones
D. F. JONES
District Chairman

12a

Rawlins, Wyoming
April 9, 1971

Mr. L. D. Foust
1502 Adams Avenue
Cheyenne, Wyoming 82001

Dear Mr. Foust:

With further reference to letter of March 26, 1971 from your Attorney Mr. Edward P. Moriarity in connection with grievance in your behalf.

This to advise you that I as District Chairman, Seniority District No. 1, am the employee's duly authorized representative to handle initial claims and grievances as per Rule 21, if and when the claims or grievances are presented in writing, stating the nature of the rule violation as per controlling agreement.

As to your claim filed with office on June 17, 1970 relative to your personal on duty injury, I stated to you by telephone at that time, there are no provisions by agreement for filing claims due to medical reasons or injuries under the terms of the present agreement when employee's are withheld from service by Doctors orders, and suggested at that time you engage legal assistance to file your claim for injuries under the terms of the Federal Liability Act, and it is my understanding that you did just so. As you are aware, we do not have control over the Medical Profession, if and when they withhold employees from service. In practically all the awards, the Adjustment Board has ruled in favor of the Carrier whereas their Doctors have withheld employee's from service due to Medical or injuries.

In conclusion, I wish to make it clear that you can expect full cooperation from this office in assisting your Attorney in any way possible. Furthermore, any misunderstanding relative to our telephone conversation, I

13a

nor any other officer of the IBEW have never refused to handle any claim or grievance under the terms of the agreements.

Yours truly,

/s/ D. F. Jones
D. F. JONES
District Chairman

cc: Mr. Edward P. Moriarity